Office Supreme Court
FILED
JAN 9
CHARLES ELMORE

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 377.

ANGLO-CHILEAN NITRATE SALES CORPORATION,
APPELLANT,

VS.

THE STATE OF ALABAMA,
APPELLEE.

Appeal from the Supreme Court of the State of Alabama.

BRIEF FOR THE APPELLEE.

THOMAS E. KNIGHT. JR.,
Attorney General of Alabama.

FRONTIS H. MOORE,
Assistant Attorney General of Alabama.

Counsel for Appellee.

THE PARAGON PRESS, MONTGOMERY

SUBJECT INDEX.

		Page
I.	Questions Presented	2
II.	The Statute Involved	3
III.	Statement of Facts	4
IV.	Summary of Argument	7
V.	Argument	8
	a. The Tax is a franchise tax upon the corporation for the privilege of exercising the corporate franchise in Alabama. The Act levying the Tax is a legal and valid exercise of the State's power and has been upheld by this court	8
	b. The Tax imposed is a franchise Tax and not a property tax, and whether the capital be invested in property otherwise exempt from Taxation is immaterial for the reason that the Tax is not imposed upon property, but for the privilege of exercising the franchise granted by the States	10
	c. The Tax here imposed is not imposed upon imports as such but on the corporate franchise, and hence is not repugnant to the Constitution of the United States	15
VI.	General Argument	25
VII.	Conclusion	28

INDEX OF CASES CITED.

	Page
Ashley v. Ryan, 153 U. S. 436	9
Armour & Co. v. Virginia, 246 U. S. 1, at p. 7	23-24
Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 69 L. Ed. 916	25
Brown v. Maryland, 12 Wheat. 419	25
Crew Levick Co. v. Penn., 245 U. S. 292	25
Cook v. Penn., 97 U. S. 66	25
Delaware Railroad Tax Case, 18 Wall 206 at 231	11
Educational Film Corporation v. Ward, 51 Sup. Ct. Rep. 170	8-12
Flint v. Stone Tracy Co., 220 U. S. 107	8-9-10
Home Insurance Co. v. New York, 134 U. S. 594	8-9-11
Horn Silver Mining Co. v. New York, 143 U. S. 305	8-9-12
Kansas City M. & B. Ry. Co. v. Stiles, 182 Ala. 138, 37 Sup. Ct. Rep. 58	3-7-21
Kansas City, Fort Smith & M. H. Co. v. Botkin, 240 U. S. 227	9
Louisville & Nashville R. R. Co. v. State, 201 Ala. 317, 39 Sup. Ct. Rep 18	3-7-9-22
New York State v. Roberts, 171 U. S. 658	8-12-16-17-22-23
Ozark Pipe Line Co. v. Monier, 266 U. S. 555	25-26
People ex rel Commercial Cable Co. v. Morgan, 67 L. R. S. 962	8-16
Postal Tel. Co. v. Adams, 155 U. S. 688	9
St. Louis Southwestern R. R. v. Arkansas, 235 U S. 350	9
State v. National Cash Credit Association, 141 So. 341	7

Southern Ry. Co. v. Greene, 160 Ala. 396, 216 U. S. 400 7-8
State v. Anglo-Chilean Nitrate Sales Corp., 142 So. 87 6-9
United States Glue Co. v. Oak Creek, 247 U. S. 321 19

STATUTES CITED.

Page
Alabama General Acts 1927, Page 176 2-3-7-9
Sec. 54.
Alabama General Acts 1923, Page 164 3
Sec. 11.
Alabama General Acts 1923, Page 266 3
Alabama General Acts 1919, Page 291 3
Sec. 16.
Alabama General Acts 1915, Page 397 3
Sec. 16.
Alabama Constitution 1901, Sec. 229 4
Alabama Constitution 1901, Sec. 232 4-7-9

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 377.

ANGLO-CHILEAN NITRATE SALES CORPORATION,

APPELLANT,

VS.

THE STATE OF ALABAMA,

APPELLEE.

Appeal from the Supreme Court of the State of Alabama.

BRIEF FOR THE APPELLEE.

This case comes before the Court on appeal from the Supreme Court of Alabama and involves the levy of a franchise tax by the State on the Appellant Corporation, which tax the Appellant claims to be illegal because the property upon which the tax was measured is asserted to have consisted of imports. The assessment against the Appellant for the amount of the tax was made by the State Tax Commission, on the 31st day of March, 1930, (Record, p. 4). An appeal was taken to the Circuit Court of Montgomery County, in Equity, from such assessment (Record, p. 1). The Circuit Court of Montgomery County by decree filed November 27, 1931, va-

cated and annulled said assessment (Record, pp. 21, 22). An appeal was taken by the State to the Supreme Court of Alabama (Record, p. 22). The Supreme Court by judgment rendered May 12, 1932, reversed the decree of the Circuit Court and remanded the cause with directions for decree in accord with the judgment of the Supreme Court. The judgment appears on page 26 of the Record and the opinion on pages 26-36, inclusive, of the Record. Application for rehearing was filed on May 27, 1932 (Record, p. 37) and overruled by the Supreme Court on June 9th, (Record, p. 38).

QUESTIONS PRESENTED.

Appellants brief (p. 2) under the foregoing heading states the proposition presented in this manner:

> "Is Section 54 of Act No. 163 approved July 22, 1927, Alabama General Acts, 1927, p. 176, under which the tax involved in this suit was assessed against the Appellant, as construed by the Supreme Court of Alabama in this case, unconstitutional and void as repugnant to clause 2 of Section 10 of Article I, and/or Section 8 of Article I of the Constitution of the United States?"

We submit that the entire record will disclose that the validity of the statute as such is not involved, but only the legality of this particular tax. As we understand it, the constitutionality of the Alabama franchise tax on foreign corporations has been upheld by this Court, and the only question that this Court is here called upon to determine is whether the Supreme Court of Alabama correctly construed its application under the particular facts presented in this case. The validity of the assessment and not the

constitutionality of the law itself is the question before this Court.

THE STATUTE INVOLVED.

Section 54 of Act No. 163 approved July 22, 1927, (General Acts of Alabama, 1927, page 176) quoted on page two of Appellant's brief is a re-write of Section 11 of the Revenue Act of 1923, (General Acts, 1923, page 164, Section 11) as amended by Act approved September 13, 1923 (General Acts, 1923 ,page 266). The 1923 Act was a re-write of Section 16 of the General Revenue Act of 1919 (General Acts, 1919, page 291, Section 16). This in turn was a re-write of clause two of Section 16 of the Revenue Act of 1915, (General Acts 1915, page 397, Section 16). All of these Acts are almost identical except that the rate has been changed by the various Acts.

The 1915 Act was construed in the case of Louisville and Nashville Railroad Company vs. State, 201 Ala. 317, and the Act held constitutional. This case was brought to this Court and certiorari denied.

Louisville & Nashville Railroad v. State, 39 Supreme Court Reporter, page 18.

Alabama also levies a franchise tax on domestic corporations based on the actual amount of capital stock. This statute was construed by the Supreme Court of Alabama in Kansas City, Memphis & Birmingham Railroad Company vs. Stiles, 182 Ala. 138, and upheld by this Court in opinion appearing in 37 Supreme Court Reporter at page 58.

Both of the statutes levying a franchise tax on domestic and foreign corporations are legislative responses to the

mandates of Section 229 and 232 of the Constitution of Alabama of 1901. These Sections are as follows:

"229. The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws."

"232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

STATEMENT OF FACTS.

The case was tried upon an agreed statement of facts which appears at pages 16-20 of the Record. Summarized these facts disclose that the Appellant was a Corporation

organized under the laws of the State of New York; that it had qualified to do business in the State of Alabama on October 10, 1927; that it had continued its qualification in the State of Alabama as evidenced by its filing a return for franchise tax with the State Tax Commission as required by law; that between the date of qualification, to-wit October 10, 1927, and March 31, 1930, the Corporation was engaged in the business of importing into the United States nitrate of soda from Chile, South America, through the port of Mobile, Alabama; that it sold and delivered said nitrate of soda to customers both within and without the State of Alabama; that on December 31, 1929, the Corporation had on hand 33,455,763 pounds of nitrate of soda which had been imported by it from Chile, South America, which was stored in public warehouses in the City of Mobile, Alabama. That all of said nitrate of soda, when imported into the United States through the Port of Mobile, Alabama, was contained in bags, each bag containing approximately 100 pounds of nitrate of soda, and that said nitrate of soda was stored in a public warehouse in said original bags, and subsequently sold and delivered by the corporation in the original bags in which the same was imported. That between the date of importation of said nitrate of soda into the United States through the Port of Mobile, Alabama, and its sale and delivery by the Corporation, none of said nitrate of soda has been removed from the original bags in which it was imported, nor have the original bags at any time been broken into. That the Corporation sold said nitrate through a salesman in the State of Alabama; that orders were subject to approval by the Corporation in New York and directions for shipment were given to the warehouse company; that the Corporation had bills receivable in Alabama amounting to $7,277.37; that the State Tax Commission assessed

against the Corporation a franchise tax based upon the value of such nitrate as shown by the return, at the legal rate of $2.00 per $1,000 making the tax $1,425.69. The Supreme Court of Alabama found from the facts that the Corporation was doing business and engaging in corporate activities within the State of Alabama. Attention is called to these comments appearing in the opinion (Record, p. 27):

> "The defendant duly qualified as a foreign corporation to do business in this State, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the State appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from State taxation."

> "We attach no significance to the requirement that orders must first be approved in the New York office; nor to the fact that when shipment was made it was with bill of lading and shipping instructions through the bank nearest the customer, the sale being for cash and the proceeds forwarded by such local bank to the Merchants National Bank in Mobile, and by that bank at once forwarded to the corporation in New York. These details go to show the corporation was actually engaged in business in this State, and enjoying the protection of its laws, and the mere fact that the proceeds of the business did not linger on deposit in this State, but were forwarded to the New York office does not serve as a point of material differentiation in this case and that of the Roberts case." (Record, page 33).

While the foregoing comments of the Supreme Court of Alabama represent its conclusions from the statement

of facts we think the attention of this Court should be directed thereto because of the quotation from State vs. National Cash Credit Association, 141 So. 541, found on page 9 of Appellant's brief. It is very clear that the Supreme Court of Alabama in the present case found that the Corporation was exercising corporate activities in Alabama.

SUMMARY OF ARGUMENT.

I.

The Appellant was engaged in business in the State of Alabama as a Corporation, and was carrying on the same in corporate form. As such it was liable for the corporate franchise tax levied on all foreign corporations doing business in a corporate capacity within the State of Alabama.

Section 232, Constitution, 1901;
Acts 1927, p. 176; Section 54;
Southern Railway v. Greene, 160 Ala. 396, 216 U. S. 400;
L. & N. Railway v. State, 201 Ala. 317; 39 Sup. Ct. Rep. 18;
K. C. M. & B. Ry. Co. v. Stiles, 182 Ala. 138, 37 Sup. Ct. Rep. page 58.

II.

The tax imposed is a franchise tax and not a property tax and whether the capital be invested in property otherwise exempt from taxation is immaterial for the reason that the tax is not imposed upon property, but for the privilege of exercising the franchise granted by the State.

Home Insurance Company v. New York, 134 U. S. 594;
Horn Silver Mining Co. v. New York, 143 U. S. 805;
People ex rel Commercial Cable Co. v. Morgan, 67 L. R. A. 962.

III.

The tax is not imposed upon imports as such but on the corporate franchise.

New York State v. Roberts, 171 U. S. 658;
Educational Films Co. v. Ward, 51 Supreme Court, 170;
Flint v. Stone Tracy Co., 220 U. S. 107.

ARGUMENT.

THE TAX IS A FRANCHISE TAX UPON THE CORPORATION FOR THE PRIVILEGE OF EXERCISING THE CORPORATE FRANCHISE IN ALABAMA. THE ACT LEVYING THE TAX IS A LEGAL AND VALID EXERCISE OF THE STATE'S POWER AND HAS BEEN UPHELD BY THIS COURT.

The tax is manifestly a franchise tax on the Corporation for the privilege of exercising its corporate franchise in Alabama. It is so denominated by the Constitution and by the statute, and as such it has been construed and upheld by the Supreme Court of Alabama throughout its history.

Southern Railway v. Greene, 160 Ala. 396, 216 U. S. 400;

L. & N. Railway v. State, supra;
State v. Anglo-Chilean Nitrate Sales Corporation, 142 So. 87, (Record, pp. 26-36, not yet officially reported);
Section 232, Constitution 1901;
Acts 1927, page 176, Section 54.

Taxation of corporate franchises as such have been upheld by this Court in the following cases:

St. Louis-Southwestern R. R. Co. v. Arkansas, 235 U. S. 350;
Postal Telegraph Company v. Adams, 155 U. S. 688;
Kansas City-Fort Smith & M. H. Co. v. Botkins, 240 U. S. 227;
Ashley v. Ryan, 153 U. S. 436;
Home Insurance Company v. New York, 134 U. S. 594;
Horn Silver Mining Company v. New York, 143 U. S. 305;
Flint v. Stone Tracy Co., 220 U. S. 107.

The Alabama franchise tax has been sustained by this Court in L. & N. v. State, supra, and K. C. M. & B. v. Stiles, supra.

While the Greene case was reversed by this Court, the holding that the tax was a franchise tax on the corporation was not disturbed, and as pointed out, the petition for certiorari in the L & N. R. R. case was denied.

While a franchise tax on foreign corporations is usually termed a franchise tax for the privilege of doing business in the State, yet the distinction between a franchise tax on a corporation for the privilege of conducting business in corporate form and the ordinary license or occupation tax is clearly marked. There is and can be but one franchise tax of this nature. There may be numerous special license or occupational taxes depending on the statutes

of the State and the activities in which the taxpayer whether corporate or individual may engage. This principle has been clearly recognized by this Court.

In Flint v. Stone Tracy Co., at page 145, this Court defined the Federal Corporate excise tax in this manner:

> "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000.00 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory, as heretofore stated."

THE TAX IMPOSED IS A FRANCHISE TAX AND NOT A PROPERTY TAX AND WHETHER THE CAPITAL BE INVESTED IN PROPERTY OTHERWISE EXEMPT FROM TAXATION IS IMMATERIAL FOR THE REASON THAT THE TAX IS NOT IMPOSED UPON PROPERTY, BUT FOR THE PRIVILEGE OF EXERCISING THE FRANCHISE GRANTED BY THE STATE.

In the case of Home Insurance Company v. New York, 134 U. S. p. 594, where a New York statute levied a tax on the corporate franchise of corporations measured by the income this Court held that income received from bonds of the United States Government otherwise exempt should be included in the income used to measure the amount of the tax.

> "It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross re-recipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

> "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property." And the manner in which its value shall be assessed and the rate of taxation, however arbitrary and capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax . . . a tax upon a corporation may be proportioned to the income as well as to the value of the franchise granted or the property possessed."

Delaware Railroad Tax case, 18 Wall. 206, at p. 231.

In New York v. Roberts, 171 U. S. 658, this Court after first quoting from Paul v. Virginia, 8 Wall. 168, and Horn Silver Mining Co. v. New York, 143 U. S. 305, said:

> "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State."

In the recent case of Educational Films Corporation v. Ward, 51 Supreme Court 170, the Court held:

> "That the tax on corporations for the privilege of doing business computed on basis of corporations entire net income for preceding year held not void as tax on federal instrumentalities, though authorizing inclusion of income from copyrights."

This case reviewed most of the authorities and we submit while not on the direct question before us, as in the case of Roberts, supra, clearly determines that a tax on a corporation for the privilege of exercising its corporate functions or doing business as a corporation is not a tax on the property used as a measurement of the tax and the fact that such property is exempt from other taxation does not relieve the corporation from paying the franchise tax required of it, even though the measurement of the amount of the tax is to be determined by property otherwise exempt.

Among other things this Court in the Educational Films case said:

"Under the Constitution the privilege of exercising the corporate franchise is the legitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crosland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stone Tracy Co., 220 U. S. 107, 162, et seq., 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this concluison, the court reaffirmed the dis-

tinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.

"Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. A state inheritaance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, * * *. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, and by the United States on a bequest to a municipality. * * * Similarly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. Van Allen v. Assessors, 3 Wall. 573, 583, 18 L. Ed. 229; * * * A tax on net income is not a forbidden tax on exports because it includes receipts from exports in the computation of the income, Peck & Co. v. Lowe, 247 U. S. 165, * * * Nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. United States Glue Co. v. Oak Creek, 247 U. S. 321. * * *"

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a

> tax such as the present, which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

It is therefore submitted with confidence that the State of Alabama may levy a franchise tax on a foreign corporation for the privilege of exercising its corporate franchise in the State and in doing so may measure the tax in such manner as it sees fit, provided that in doing so it does not impose a burden on interstate or foreign commerce.

THE TAX HERE IMPOSED IS NOT IMIMPOSED UPON IMPORTS AS SUCH BUT ON THE CORPORATE FRANCHISE AND HENCE IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

While a State may not levy a tax on imports or impose a tax on the business of foreign commerce, it is submitted that the tax here attacked is not a tax on imports, nor is it in substance or effect a tax on the business of engaging in foreign commerce.

There is as pointed out a definite and distinct difference between a corporation franchise tax and a license or occupation tax for the privilege of engaging in a particular avocation.

Under the authorities quoted and cited above the State in fixing a basis of measurement for corporate franchise tax may include tax exempt property, even the income from bonds of the United States. We submit the question should be decided on these authorities but the particular question as we conceive it has been before this Court and decided adversely to Appellant's insistence.

In New York State v. Roberts, 171 U. S. 658, the facts were that Parke Davis Co., a Michigan corporation was engaged in business within the State of New York. The State of New York levied a franchise tax upon corporations measured in this manner:

> "The amount of capital stock which shall be the basis for tax under the provisions of section three in in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

Prior to the Roberts case the New York Court of Appeals had thus construed this statute:

> "A franchise stock corporation owns three things: (1) its capital stock existing in money or property; (2) its surplus, if any; (3) its franchise. *The franchise is the thing taxed,* and the tax is computed upon the basis of the amount of its capital stock employed within the State. The share stock, or in other words, the paper certificates held and owned by individuals, are not employed within this state. It is the capital represented by such certificates that is so employed. * * * Capital stock was defined as 'money or property which is put into a single corporate fund by those who by subscription therefore become members of the corporate body.' *'Capital stock' and 'capital' are practically the equivalent of each other when considered as a basis for a franchise tax."*
>
> People ex rel Commercial Cable Co. v. Morgan, 178 N. Y. 433, 67 L. R. A. 960.

This case decides that "capital stock" as used in the statute and "capital" are practically the equivalent of

each other. This construction given by the New York Court renders the statute construed in the Roberts case to be in effect the same as the Alabama Statute.

Parke Davis and Company had a warehouse and depot in New York City and there kept manufactured products sold at wholesale in original packages. The Company imported crude drugs from foreign countries. Some of these were sent to the Detroit factory for use and some were sold in the original packages in the City of New York.

The claim was made that the inclusion of these imports in the capital employed in the State was invalid and violative of the Federal Constitution.

In answer to this contention this Court said:

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of Brown v. Maryland, 12 Wheat. 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. *From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.* Society for Savings v. Coite, 6 Wall. 594; Provident Institution v. Massachusetts, 6 Wall. 611; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Home Insurance Co. v. New York, 134 U. S. 594.
>
> "When a corporation of one state, whose business is that of a common carrier, transacts part of that

business in other states, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective states infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different states, and the subject has been much discussed in several recent cases. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Pittsburgh, Cincinnati, etc. Railway Co. v. Backus, 154 U. S. 421; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 165 U. S. 194. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

"The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of Paul v. Virginia, 8 Wall. 168, and of subsequent cases affirming that one. Horn Silver Mining Co. v. New York, 143 U. S. 305, may be specially mentioned, as it involved a similar question and the same statutes which are before us in the present case. The Horn Silver Mining Company was a corporation of the Territory of Utah, where it carried on a mining and manufacturing business. It also carried on business in the State of New York, and was there subjected to an annual tax upon its corporate franchise or business as prescribed in the statute of the State of New York. The company refusing to pay the tax, proceedings to enforce its payment were resorted to, which resulted in the case being brought to this court, where some of the questions raised in the present case were considered and determined. The conclusions reached were that the law in question did not tax property not within the State;

nor regulate interstate commerce; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the state."

We have discussed this case at length because, we submit, the facts and the statute construed bear close resemblance to the case now before the Court.

In the Roberts case only a part of the capital employed was employed in imports. According to Appellant's contention in the present case all the capital employed in Alabama is represented by imports. We respectfully submit that the principle involved is not thereby affected. If the tax is on the corporation for the privilege of exercising its corporate functions in Alabama, then all capital employed can be used in the measurement of the amount.

It is particularly to be noted that in the New York case the tax was measured according to the amount of capital stock employed in the State, and not according to annual dividends or net profits. While a portion of the report of the case would so indicate, a careful reading will disclose that the statute had been amended as set out in the opinion, and as quoted above. Capital stock so used, was construed by the New York Court of Appeals to be equivalent of capital employed. This construction was binding on this Court when it came to decide the Roberts case.

Appellant attempts to distinguish the Roberts case by quoting from United States Glue Company v. Oak Creek, 241 U .S. 321. While it is respectfully submitted that the effect of this case is to support Appellee's contention rather than that of Appellant, the inference attempted to be drawn therefrom by Appellant is inapplicable because of a misconception of the facts in the Roberts case.

The tax there was not measured by net income or net profits but by capital stock (i. e. capital) employed in the State.

The entire burden of Appellant's brief is that the tax is a tax on imports or is a regulation of foreign commerce. Clearly it is not a tax on the imports as such. If the original packages had been broken and mixed with the general mass of property in the State, the franchise tax would have been no different. The tax is laid on the corporate franchise, measured by the amount of property in the State. The tax is non-discriminative applying alike to all foreign corporations which choose to exercise their corporate franchises in the State of Alabama.

Neither is it a license on the sale of such imports or a regulation of foreign commerce. It is immaterial so far as the nature of the tax is concerned whether the capital employed in the State of Alabama on which the tax is measured consists of property otherwise tax exempt or not.

The tax does not and can not have the same effect as a sales tax or a license tax for the privilege of selling imports. The tax is on the corporate privilege and any effect it may have on imports is merely incidental. If the capital employed in Alabama were employed in property exempt from taxation under Alabama laws we submit Appellant could not argue for a moment that the value of the franchise can not be measured by such property. Is the rule different as to property otherwise exempt?

The tax clearly not being a tax on imports, appellant argues that its business was exclusively foreign commerce and hence the effect is the taxation or regulation of such commerce.

The statement of facts discloses that Appellant regularly qualified to do business in Alabama. There was

no restriction to this qualification, but Appellant qualified to do whatever business it desired. It imported nitrates into Mobile, stored them there, and sold the same, both within and without the State of Alabama. We submit, as was concluded by the Supreme Court of Alabama that the Appellant was conducting some local operations in Alabama. If imports were not involved no question could have arisen as to the local nature of the business. Appellant recognized this fact and qualified to do business in Alabama. That fact, we submit, should estop Appellant from any claim that it is not doing business within the meaning of the Constitution and the statute.

The Alabama franchise law was before this Court in Kansas City M. & B. Railway Co. v. Stiles, supra, and this Court after differentiating between the Alabama tax and that condemned in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, said of the Alabama franchise tax:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in Kansas City, Ft. S. & M. R. Co. v. Botkin, supra, is the nature and character of the tax imposed. The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce.
>
> "We find nothing in the amount or character of the tax which makes it a burden upon interstate com-

merce, and so beyond the authority of the state to impose."

The Louisville and Nashville Railroad case involving the statute here involved was decided in a memorandum decision as follows:

> "Dismissed for want of jurisdiction upon the authority of St. Louis-Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 35 Supreme Court 99, Kansas City, Memphis and Birmingham R. Co. v. Stiles, 242 U. S. 111, 37 Supreme Court page 58."
> L. & N. R. R. vs. State, supra.

These two cases, we submit, clearly uphold the constitutionality of the Alabama franchise tax as levied upon both domestic and foreign corporations and removes the same from the rule applied in Western Union Telegraph Co. v. Kansas. With this Court thus upholding this particular law, and in the face of the case of New York v. Roberts, 171 U. S. 658, we submit the weight of authority is opposed to the position taken by Appellant.

While a State may not tax imports or regulate foreign commerce, we submit that a tax measured by capital employed in such imports is not invalid "where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

It is submitted that there is nothing in the amount or character of the tax which makes it a burden on or regulation of foreign commerce beyond the authority of the State to impose.

The tax is levied upon the corporate franchise—a legitimate exercise of the State's prerogative. The measurement of the tax is based on the amount of capital employed by the corporation within the State of Alabama. It is

not a sales tax or a tax on gross receipts where every transaction might be affected. It is not even an ordinary occupational tax for the privilege of selling its products. There is no attempt to regulate, license or tax the business of the corporation. Only the exercise of the corporate franchise is taxed. The corporation can store, sell, or dispose of its imports in any manner it chooses without any report to any agency in the State of Alabama, or without the payment of any other tax, or without interference by the State in any way, except possibly in the enforcement of its inspection laws.

Appellant's tax will not be affected one cent by the volume of business done. Its sales, whether within or without Alabama could be a million or ten million or one hundred million dollars annually, but if it had only seven hundred thousand dollars capital employed in Alabama on December 31st, then the tax would be the same.

We respectfully submit that the following language in the Roberts case is applicable and decisive in the case at bar.

> "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

The Roberts case was cited approvingly in Armour & Co. vs. Virginia, 246 U. S. page 1, at page 7, where it was said:

"In other words, to resume, the error of the arguments results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and the indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. New York v. Roberts, 171 U. S. 658; Reymann Brewing Co. v. Brister, 179 U. S. 445."

While the line of demarcation between a tax on the sale of imports and a tax on the corporate franchise measured by property which consists of imports, is close and the argument that the taxation of the latter is permissible while the former is not, may seem a tenuous one, we submit that there is a distinction, and one which this Court has clearly recognized. This rule was elaborately discussed by Mr. Justice Stone in Educational Films Corp. v. Ward, supra. The immunity of the obligations of the United States Government from taxation is absolute. Yet in the measurement of a corporate excise tax, the income from such obligations may be included.

We respectfully submit that the rule should not be different when the immunity arises from definite grants to the Federal Government, such as are contained in the

interstate commerce and foreign commerce clause of the Constitution, than when the immunity arises under the implied powers of the Federal Government.

GENERAL ARGUMENT.

Appellant cites in support of its contention the following cases which we will discuss briefly:

Brown v. Maryland, 12 Wheat. 419, presents the original decision of Chief Justice Marshall holding that a State could not levy a license tax on the business of importers as such. There is no dispute as to the doctrine there laid down and since adhered to, but as was pointed out in the Roberts case, supra, the facts were not applicable.

Neither is Crew-Levick Co. v. Penn., 245 U. S. 292, pertinent under the facts in the present case. In that case the tax was measured by gross receipts—the necessary effect being to tax or affect each transaction.

Cook v. Penn., 97 U. S. 566, invalidated a tax measured by the amount of sales made by an auctioneer such goods consisting of imports in original packages. Again, the tax was on the business and affected every transaction.

Appellant relies principally upon the cases of Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 69 L. Ed. 916, and Ozark Pipe Line v. Monier, 266 U. S. 555.

It the former case it was conceded by the Attorney General that the corporation was engaged in Massachusetts *"exclusively in interstate commerce."*

The Massachusetts Act attempted to levy a tax measured by the amount of business done in Massachusetts. The Corporation had only a nominal amount of property in the State. All its business transactions were in inter-

state commerce. The tax had the necessary affect of taxing the business and to a certain extent each transaction. If we properly interpret this decision, it is distinguishable from the one at bar, because the tax was measured by and dependent on the operations of the company, all of which were admittedly interstate, while in the present case only the property in the State is used as a measurement, and the tax is not affected by the amount or character of Appellant's operations.

Ozark Pipe Line v. Monier presents the extreme position taken by this Court as we read the decisions. In this case the privilege tax was the right to do business. This holding of the Supreme Court of Missouri (282 Mo. 213) appears to have been of influence with this Court in determining the nature of the tax, and that together with the fact that the license or permit issued was to engage "exclusively in the business of transporting crude petroleum by pipe line," indicates at least that the Court considered this tax as a business tax rather than one purely on the corporate franchise.

In both of these cases Mr. Justice Brandeis dissented. We submit his dissent as expressed in the Monier case, expresses the correct rule applicable in the present case. The following quotations are deemed pertinent:

> "Nor is the tax laid upon the privilege of doing business: It is laid upon the privilege of carrying on business in corporate form; of doing so with a usual place of business within the state.'
>
> "The tax is held void solely on the ground that it is obnoxious to the commerce clause. A state tax is obnoxious to that provision of the Federal Constitution only if it directly burdens interstate commerce, or (where the burden is indirect) if it obstructs or discriminates against such commerce."

"There is no contention that, in fact, the tax discriminates against interstate commerce. The tax is applied alike whether the business done is interstate or intrastate, or both."

"Can it be said that this tax directly burdens interstate commerce? A tax is a direct burden if laid upon the operation or act of interstate commerce. Thus, a tax is a direct burden where it is upon property moving in interstate commerce (Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 67 L. Ed. 309, 25 A. L. R. 1195, 43 Sup. Ct. Rep. 146; Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. Ed. 227, 42 Sup. Ct. Rep. 101; United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 66 L. Ed. 234, 42 Sup. Ct. Rep. 105), or where, like a gross-receipts tax, it lays a burden upon every transaction in such commerce (Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 297, 62 L. Ed. 295, 299, 38 Sup. Ct. Rep. 126). But a tax is not a direct burden merely because it is laid upon an indispensable instrumentality of such commerce, or because it arises exclusively from transactions in interstate commerce. Thus, a tax is valid although imposed upon property used exclusively in intertstate commerce (Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 284, 25 L. Ed. 412, 415; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 306, 49 L. Ed. 1059, 1062, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100); or although laid upon net income derived exclusively from interstate commerce (United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. Ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 64 L. Ed. 445, 458, 40 Sup. Ct. Rep. 221). Compare William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. Ed. 1049, 38 Sup. Ct. Rep. 432; Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157, 40 Sup. Ct. Rep. 93. These taxes were held valid because, unlike a gross-receipts tax, they do not withhold, 'for the use of a state, a part of every dol-

lar received in such transactions' See 245 U. S. p. 297. Surely the tax upon the corporate franchise is as indirect as the tax upon the pipe line."

CONCLUSION.

We submit that the decision in the Roberts case, where the facts and the statute are almost identical with those of the case at bar should not be overturned. The principle there declared and reaffirmed in Armour & Co. v. Virginia, supra, supported by the Educational Films case, and as thus enunciated by Mr. Justice Brandeis should be controlling in the present case.

We respectfully submit the opinion and judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

THOMAS E. KNIGHT. JR.,
Attorney General of Alabama.

FRONTIS H. MOORE,
Assistant Attorney General of Alabama.

Counsel for Appellee.